345TH DISTRICT COURT
TRAVIS COUNTY COURTHOUSE
P. O. BOX 1748
AUSTIN, TEXAS 78767

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May 14, 2012

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Re: Cause No. D-1-GN-11-001364; *Environmental Defense Fund, Inc. et al vs. Texas Commission on Environmental Quality; in the 261st Judicial District Court, Travis County, Texas*

Dear Counsel:

Enclosed please find attached a decision letter from Judge Yelenosky regarding the above mentioned cause. The original letter has been filed with the District Clerk's Office.

Please feel free to contact me if you have any questions or concerns.

Sincerely,

Angela Riley
Court Operations Officer, 345th District Court
Travis County, Texas

Enclosure(s) 7 pages including this cover page

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Re: Cause No. D-1-GN-11-001364; *Environmental Defense Fund Inc., et al vs. Texas Commission on Environmental Quality; in the 261st Judicial District Court, Travis County, Texas*

Dear Counsel:

This letter is to announce my intended ruling. The written order will be the ruling of the court.

Consideration of clean fuels and IGCC

This judge rendered the judgment in *Blue Skies* that was upheld on appeal. There is no significant distinction between that case and this one that would lead to a different result here. TCEQ did not err by failing to require consideration of clean fuels and IGCC.

Surrogacy policy for $PM_{2.5}$

The surrogacy policy, when first issued by EPA in 1997, was contained in an EPA guidance memo without force of law. Sierra Club and EDF argue, therefore, that all EPA statements regarding the surrogacy policy since then are at least as authoritative as the 1997 guidance. This may have been true until 2008 when EPA issued a final rule which explicitly references the 1997 guidance and states that SIP states may continue to follow it until mid-2011, which was after the Commission's approval of this permit. The rule does not reference other EPA guidance, memo, or letters. Compliance with the surrogacy policy as described in the 1997 guidance was lawful.

Adequate Monitoring for PM limits

As TCEQ argues, the record supports the adequacy of the chosen method of monitoring. That another monitoring method is "proven technology" and EPA recommended it does not place on a burden on TCEQ to articulate why it should not be required. The plaintiffs have not demonstrated any error in the monitoring method.

ED's direction to technical staff regarding BACT analysis

The Sierra Club failed to preserve this issue by failing to identify the legal basis of the claim; moreover, there is no legal basis. There is no "lawful procedure" requiring that staff who conduct an analysis determine when the analysis is complete. The sufficiency of the BACT analysis is determined by looking at the analysis itself. Whether the staff member performing the analysis stopped at a particular point because he thought the analysis was complete or stopped because his superior told him to stop makes no difference. Las Brisas is correct that Sierra Club's only claim is this regard would be that there is no substantial evidence to support the BACT analysis.

Petroleum Coke/ MACT

As TCEQ's brief put it "common sense and current practical and technical realities compel the conclusion that pet coke-fired boilers that, like Las Brisas' boilers, meet all other requirements of EGUs are EGUs under ¶ 112 and not industrial boilers." This despite the fact that EGUs are defined as electric generating units that burn "fossil fuels" and petroleum coke has not been considered by the EPA to be a fossil fuel. The same practical and technical realities would compel the conclusion that petroleum coke, derived from oil and emitting the same hazardous pollutants as oil and coal, should be treated like oil and coal. If practical and technical realities are appropriate to consider, it is arbitrary to consider them for one term and not others. If they are not to be considered, then a petroleum coke-fired unit is not an EGU; it is an industrial

boiler subject to case-by-case MACT. Either way, it was error not to require the case-by-case MACT.

The EPA's very new rule defining petroleum coke as both a fossil fuel and as oil provides a uniform standard MACT that supersedes the case-by-case method. But, before obtaining a permit, Las Brisas must still demonstrate that it will comply with the new, standard MACT.

Material Handling Operations Plan and Modeling

The question is not whether TCEQ can bind a non-party material supplier, which TCEQ cannot do, but whether TCEQ can bind the permit-holder to the location, control and nature of material handling it modeled to get the permit. As the ALJ's suggested, TCEQ could have issued a permit requiring Las Brisas to use one of the two material handling scenarios it modeled. If a future contingency outside the control of the permit-holder were to preclude that material handling site and method, the permit holder could seek an amendment of the permit.[1] But to issue a permit that does not specify the location, control and method of material handling is flawed. First, since the law requires modeling of the secondary source to demonstrate that its operations will not violate the Clean Air Act, *before a permit may be issued for the primary source*, Las Brisas and TCEQ simply have no legal defense in arguing that any secondary source would itself have to get a permit at a later date. Second, that modeling cannot be meaningless. To say, as Las Brisas does, that all modeling involves hypotheticals is both true and misleading. Only certain variables are necessarily hypothetical. No one would argue, for instance, that the location of the power plant itself need not be specified.[2] Third, if hypothetical scenarios to which no one is bound are to be considered, then, at least, the worst-case scenario, legally and factually, must be modeled. Here, the worst-case scenarios factually and legally were not modeled. It is possible, and not prohibited by the permit TCEQ approved, that the material handling will be located closer to the Las Brisas plant, concentrating the two sources of air pollution. It is possible, and not prohibited by the permit, that Las Brisas will own or otherwise control the material handling. This would require consideration of the material handling as part of one stationary source.

Staff Modeling and Water Code section 5.228

The applicable Water Code section states that in a contested case, the Executive Director of the TCEQ and his staff may participate as a party but "may not assist a permit applicant in meeting its burden of proof." The same statute says the staff "may participate ... for the sole purpose of providing information to complete the administrative record." The latter is language of limitation, not expansion, and, in any event, the more specific prohibition on assistance in meeting the burden of proof prevails as a matter of statutory construction. The Commission's order states that "[t]he analysis of Applicant, with TCEQ modeling staff's supplemental analysis, demonstrate that, after accounting for potential secondary emissions, the proposed sources will not cause or contribute to a violation of the PM_{10} 24-hour increment." The record further

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[1] Paragraph 1 of the permit states that a permit-holder may make application for an amendment.

[2] Indeed, the permit locates the plant by GPS coordinates.

reflects that the staff not only identified deficiencies in the applicant's modeling but made the corrections – not all of which were obvious from the identification of the deficiency – and ran the model again with the corrections. TCEQ and Las Brisas argue that the staff's work was consistent with TCEQ rules. One rule makes an exception for work the executive director is "required by statute or rule to perform." That rule is not applicable because the executive director and his staff were not required to do what they did.[3] To conclude otherwise, one would have to be able to say that Las Brisas had the legal right to compel the staff to make the corrections and re-run the model, which is obviously not true. Another rule makes an exception for "any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application." That rule cannot be reconciled with the statute. There is no exception in the statute to the prohibition on assisting the applicant in meeting its burden of proof. And any exception could not delegate a determination of the applicability of the exception to the subjective – and therefore unreviewable - discretion of the very party constrained by the statute. (Under the exception in the rule, the document need not *actually be* necessary to the review, it merely has to be "*determined by* the executive director to be.") Likewise, the intent or lack of intent of the staff is irrelevant to the statute.

Though all parties agree that the Water Code provision as quoted above applies, TCEQ and Las Brisas point out that it has since been repealed.[4] As TCEQ states, the legislature also amended the statute to now *require* the Executive Director and staff to participate as a party in a contested case. Clearly, the legislature has decided the role of the staff now should be exactly what it previously prohibited. This court's role, however, is to determine the intent of the legislature in enacting the applicable statute, without regard to the legislature's change of mind evidenced in a later, inapplicable statute. That a new proceeding before SOAH would permit Las Brisas to rely on the work of TCEQ staff to meet its burden, does not eliminate the harmful error in the original proceeding.

April 12, 2010 1-hour NO_2 and August 23, 2010 1-hour SO_2 NAAQS

Both federal law and the Texas SIP preclude the issuance of a permit for construction of "a new stationary source" in an attainment area absent a demonstration of compliance with all NAAQS. NAAQS have a promulgated effective date, and there is no statute or regulation cited by Las Brisas or TCEQ altering the effective dates of these two NAAQS. The Clean Air Act does provide that a state has 3 years to adopt and submit to EPA a State Implementation Plan "for each air quality control region" for a new NAAQ, but that provision says nothing about a delay in the effective date of the NAAQ for new stationary sources. A plan for reaching the new

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[3] Las Brisas cites to a 1988 EPA memo, which perhaps refers to remodeling but does not say it's required, has no force of law, and, in any event, could not be interpreted to say that the Clean Air Act requires the Texas TCEQ to assist an applicant in meeting its burden of proof when the Texas legislature has forbidden it. TCEQ quotes the Executive Director as testifying that he had a practice, and believed he had a responsibility, to "work through the evaluation with the applicant to resolve the predictions," but cites no authority for such an obligation.

[4] The new statute applies to a proceeding before SOAH "pending or filed" on or after September 1, 2011.

standards for air quality across a region, is not logically or legally a prerequisite for requiring demonstration of compliance by new stationary sources.

Assuming that EPA has discretion under federal law to excuse compliance with a new NAAQ, under the procedural facts in *Avenal*, this does not necessarily mean that TCEQ has that same discretion under state and federal law. Even if TCEQ has that same discretion, the procedural facts here are entirely different. In *Avenal*, had EPA complied with its statutory deadline to issue a permit, the permit would have been issued prior to the effective date of the new NAAQS. Here, there was no deadline missed by TCEQ. Moreover, the new NAAQS became effective while Las Brisas' application was still under review and months prior to the second hearing before SOAH, on remand from the Commission.

Counsel should confer to determine if there is any agreement on the form of an order. Entry of the order may require additional briefing and/or a hearing to enable the court to determine whether reversal, or reversal and remand, is appropriate.

Sincerely,

Stephen Yelenosky
Judge, 345th District Court
Travis County, Texas

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Original: Hon. Amalia Rodriguez-Mendoza, District Clerk